No. 83-1336

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IN THE

Supreme Court of the United States

October Term, 1983

MARY JONES, et al.,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

RESPONDENT STATE OF NEW YORK'S BRIEF IN OPPOSITION TO CERTIORARI

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Questions Presented

1. Whether the Court of Appeals was correct in holding—under Rule 23(e) of the Federal Rules of Civil Procedure and under The Civil Rights Attorney's Fee Awards Act (42 U.S.C. § 1988)—that the amount of attorneys' fees agreed to by the parties in a proposed settlement of a class action must be independently reviewed by a district court for "reasonableness."

2. Whether the district court was correct in holding that in calculating a reasonable attorney's fee award under 42 U.S.C. § 1988, it may consider the nature of the work performed and the results achieved.

The following question, while not raised in the courts below, was briefed by petitioners and accordingly is addressed by respondent:

3. Given that waivers of sovereign immunity are strictly construed in favor of the sovereign and in light of the policy underpinnings and legislative history of 42 U.S.C. § 1988, whether fee awards under 42 U.S.C. § 1988 must be based on marketplace antitrust rates.

Parties in Court Below

Mary Jones, Beverly Harris, Ernest Simmons, Mildred Malloy, *petitioners*. Amalgamated Warbasse Houses, Inc., New York State Division of Housing and Community Renewal, Richard Berman, *respondents*.

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Statement of the Case

Respondent Amalgamated Warbasse Houses, Inc. (Warbasse) is a state financed apartment house complex consisting of 2,600 units. On December 16, 1980 petitioners filed a class action complaint against Warbasse alleging that vacant apartments at the complex were filled through racially discriminatory policies and practices that resulted in 99% of the apartments being occupied by whites. Also named as a defendant was the New York State Division of Housing and Community Renewal which, it was alleged, regulates tenant admission practices at all state financed housing projects.

On August 9, 1982 the parties submitted to the district court a proposed settlement agreement for review and approval pursuant to Fed. R. Civ. P. 23(e). It provided that Warbasse would recruit minorities and create a minority waiting list. Approximately one out of every four vacant apartments was to be filled by persons on that minority list until 215 apartments were occupied by persons from that list. (Petition, pp. 22a-23a). (It was projected that eight years would be required to realize the goal of 215 minority occupied apartments.) The proposed settlement also provided for an award of attorney's fees of $129 an hour to each of plaintiffs' three attorneys. The total award of $41,750 was to be paid 60% by Warbasse and 40% by the State of New York.

On November 15, 1982 the district court approved the settlement of merits but modified the agreement on attorneys' fees. The court found the hourly rate of $129 ex-

cessive, beyond the "range of reasonableness" (Petition, p. 51a), for two reasons. First, the time expended was largely on tasks preliminary to litigation and in the discussion of settlement terms; no time was expended in depositions, or in the briefing of numerous legal points or in the preparation and conducting of a protracted jury trial. (Petition, p. 57a). Secondly, the court held that the terms of the settlement represented a compromise —plaintiffs did not "win"—and therefore that the "results achieved" could not support the hourly rate. (Petition, p. 56a). The court approved $75 as the appropriate average hourly rate for all time expended "from the most routine to the most challenging." (Petition, p. 52a). The total award was reduced to $26,000, with Warbasse ordered to pay $15,880 and the taxpayers of New York $10,120. (Petition, p. 7a).

On February 18, 1983 the district court by supplemental memorandum denied petitioners' motion for reconsideration. Nevertheless, it refined the $75 an hour rate so that lead counsel received $77 an hour, the second attorney, $70 and the third, $60. (Petition, pp. 54a-55a).

In their appeal to the Second Circuit petitioners argued for the first time that a district court must rubber-stamp an attorneys' fees settlement absent evidence of irregularities. On November 14, 1983 the Court of Appeals affirmed. It held that settlements must of course be encouraged. "An arms' length negotiated agreement among the parties weighs strongly in favor of approval." (Petition, p. 10a). Where, however, the parties and class members are unlikely to complain and the district court has "good rea-

son" to find the award excessive, the strong presumption in favor of the settlement agreement can be overcome. The district court must have the power to adjust the fee downward "in class actions and in any litigation involving fee shifting statutes like § 1988," out of "concern that the public will perceive the award as excessive," and to "promote confidence in the integrity of the judicial process." The appeals court also found such district court review "a proper exercise of authority over officers of the court in litigation pending before the court." (Petition, pp. 14a-15a).

Summary of Argument

I

The courts must independently review a proposed settlement on attorneys' fees in class action and in fee-shifting cases to safeguard the integrity of the bar, as an aspect of its duty to supervise attorneys it approves as counsel for a class, and to allay the public's perception that attorneys are the only winners in these cases. Independent judicial review of proposed fee award settlements is also necessary because arms' length and good faith settlement negotiations will often not protect against excessive awards. Moreover, an attorney may accept inadequate class relief to settle a case to guarantee himself a fee award. The district court has a duty to protect against this potential conflict by independently establishing that the fee award is in line with the results achieved.

Petitioners' claim that such judicial review will discourage settlement agreements is baseless. Proposed set-

tlements have long been submitted to district courts for critical review under Rule 23(e), Federal Rules of Civil Procedure. This has not had any discernible "chilling effect" on the development and submission of proposed settlements.

II

The issues raised in *Blum* v. *Stenson* are not raised here. The holding of the district court, that hourly rates must reflect the nature of the work performed, merely protects a defendant, for example, from being billed by plaintiffs' senior attorney on the basis of his customary hourly rate for time he expends at a copying machine. The district court's holding is therefore but a routine application of this Court's holding in *Hensley* that "billing judgment" principles must guide the court to protect defendants from excessive awards.

Petitioners' assertion that § 1988 fee awards must equal the highest fees available in the marketplace is unsupportable. "Moderation" is the guiding principle controlling awards under all fee-shifting statutes. In addition, the legislative history and the policy considerations which undergird § 1988 do not permit fee awards equal to those obtained by antitrust lawyers in the marketplace.

ARGUMENT

I

The appeals court correctly held that a proposed settlement agreement relating to fees in a class action or fee-shifting case must be independently reviewed by the district court to promote confidence in the integrity of the judicial process and to protect against excessive fee awards.

The public continues to view the bench and bar with cynicism because class action and fee-shifting litigation too often primarily benefits counsel for the plaintiff class. To allay these suspicions fee awards must be subject to more than adversarial testing. *Gabriele* v. *Southworth*, 712 F. 2d 1505, 1507 (1st Cir. 1983). The surest path to public ridicule of the bar and bench is a procedure under which the court carefully reviews all aspects of a settlement agreement *except* provisions relating to attorney's fees. That is precisely the approach petitioners urge.

Independent judicial review of a fee agreement is also an aspect of judicial supervision of officers of the court. (Petition, p. 15a). In a class action, an attorney's status as the class representative results from a judicial determination. If petitioners' counsel were only representing named plaintiffs the results obtained would not justify a fee award of $26,000. The only relief obtained for the named plaintiffs was the right—never exercised by any of them—to appear at the top of the newly created minority waiting list. The judiciary's power to create a substantial business opportunity for an attorney, as the class's repre-

sentative, entails a duty in the judiciary to supervise carefully the substantial reward reaped by that attorney. Indeed, an attorney has a duty to support rather than challenge such supervision.

Arms' length negotiations will not assure the vindication of these concerns nor will they always protect against excessive awards. As the appeals court observed, there are settlements in which "no one is likely to complain." (Petition, p. 12a). Plaintiffs' counsel may, for example, have the benefit of economic leverage that impels a defendant to settle. Here, Warbasse and the State were forced to conclude that the cost of settlement was lower than the cost of further litigation which would have entailed additional fees not only for time expended by their own counsel but for time expended by plaintiffs' counsel.

District court review of the settlement also protects against a conflict of interest between the class and its counsel. Plaintiff's attorney may accept insufficient relief for the class because he knows that settlement will result in a substantial fee award. Defendant obviously will not protest. The negotiations will appear to proceed in good faith. The court, by independently establishing that the fee award is in line with the "results achieved," provides some measure of protection against this potential conflict.[1] *See,* discussion and authorities cited in *Foster* v. *Boise-Cascade, Inc.,* 420 F. Supp. 674 (S.D. Tex. 1976), *aff'd on basis of district court opinion,* 577 F. 2d 335 (5th Cir. 1978).

1. A procedure that requires a settlement of the merits before attorneys' fees are discussed or sought is of limited value. Under that procedure, the attorney knows full well that if and when he settles the merits a substantial fee award is around the corner. Only the exact amount is unknown.

Petitioners' assertion that settlements will be discouraged unless this Court directs lower courts to rubber-stamp privately negotiated agreements, is sophistry. The plaintiffs' bar has long known that proposed settlements may be rejected by the courts under Fed. R. Civ. P. Rule 23(e). This has not had any discernible "chilling effect" on the submission of settlement agreements. Moreover, the occasional rejection of a proposed settlement is a small and necessary price for the vindication of Rule 23(e) and related concerns.

Petitioners correctly note that *Hensley* urges and contemplates settlement of fee disputes.[2] But they are incorrect in suggesting that under *Hensley*, settlement is so important that all else must be sacrificed. Under petitioners' reading of this Court's holding a settlement must be approved even if the fee agreed upon is grossly disproportionate to the results achieved. Yet *Hensley* teaches precisely the opposite.

The Court of Appeals correctly decided the issue.[3] No authorities support a contrary holding and certiorari should be denied.

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2. Settlements will be more likely when the parties learn the parameters of permissible fee awards through this Court's decision in *Blum* v. *Stenson*, S. Ct. Dkt. No. 81-1374.

3. The State of New York, to honor its commitments under the settlement, aligned itself with plaintiffs on the facts in the Court of Appeals. Respondent is nevertheless of the clear view that this case should not be reviewed in this Court and that the principles relied upon by the Court of Appeals and the district court are correct.

II

A. The issues raised in *Blum* v. *Stenson* are not raised in this case.

Petitioners assert that this case raises issues "similar" to those before the Court in *Blum* v. *Stenson*. It does not. *Blum* raises the following three issues, none of which is raised here:

1. Section 1988 explicitly limits fee awards to a "prevailing party." A fee award that is adjusted upward because payment is contingent on success indirectly compensates an attorney for cases he has lost. The issue then is whether a district court that adjusted a fee upward because of its "contingent nature," circumvented Congress's explicit directive that awards be limited to meritorious cases—those in which a party prevails; or whether the district court forced the State of New York to pay fees indirectly that it may not be required to pay directly. Also under review is the routinely advanced claim that the "novelty and complexity" of a case justifies a "bonus" award.

2. Whether hourly rates awarded to non-profit organizations must be substantially lower than those awarded a commercial firm because of the non-profit firm's lower overhead and the absence of any right to a distribution of profits, or any need for a profit component in the award to induce such organizations to undertake civil rights cases. Forced to its limits, the issue may be stated as whether a fee awarded by a court, even to a private practitioner, should reflect the attorney's reasonable overhead; *e.g.*, whether a plaintiff's attorney practicing out of his home

with a telephone answering machine, may demand a fee from the State of New York equal to the fee freely negotiated by a large commercial firm with its private clients.

3. Whether an attorney's failure to maintain detailed contemporaneous time records, especially where two or more attorneys claim hours for the same activity, requires a downward adjustment of the fee award.

B. The issue raised below was correctly decided under *Hensley* v. *Eckerhart*.

The district court below held that fee awards may vary based on the "complexity and difficulty of the work" performed. (Petition, pp. 42a, 57a).[4] It held that time expended on tasks preliminary to litigation and in the discussion of settlement terms should be compensated at rates lower than those granted for a protracted jury trial attended by complex pretrial discovery and legal issues. (Petition, pp. 40a-42a, 57a). The district court did not attempt to assign an hourly rate to each activity. Rather it estimated that $75 an hour was an appropriate average hourly rate for all work "from the most routine to the most challenging." (Petition, p. 52a).[5]

4. The district court also reduced the hourly rate from $129 to $75 based on the results achieved and because detailed contemporaneous time records were not maintained. (Petition, pp. 42a, 57a, 61a). These holdings echo those of *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933 (1983).

5. Some district courts are quite comfortable assigning different hourly rates to each task performed. *See*, for example, *Foster* v. *Boise-Cascade*, 420 F. Supp. 674, 690-695 (S.D. Tex. 1976), *aff'd* 577 F.2d 335 (5th Cir. 1978); *Norwood* v. *Harrison*, 410 F. Supp. 133, 142, n.10 (N.D. Miss. 1976).

The rule adopted by the district court is but a correct application of this Court's *unanimous* holding that "billing judgment" is a critical guidepost for both court imposed and privately negotiated attorney's fees. *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933, 1939-40 (1983) (Powell, J.); p. 1947 (Brennan, J. concurring). To allow fees without regard to the nature of the work performed would force defendants to pay fees at the whim of plaintiffs' counsel. It would allow a senior partner in a firm representing plaintiffs to bill the State his customary hourly rate if he decides to expend his time researching whether a particular interrogatory is impermissibly burdensome or if he decides to expend his time at a copying machine.

The principle adopted by the district court is also supported by *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), the only case cited in both Senate and House Committee Reports for § 1988. In *Johnson* the district court was directed to "scrutinize" the fee application to assure the "proper utilization of time" and was authorized to base a fee award on the "type of work performed." *Id.* at 717. See *also, Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 637 (6th Cir. 1979) ("necessary services . . . which could reasonably have been performed by less expensive personnel may be compensated at a lower rate than an attorney's normal billing rate"); *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670, 677 (3d Cir. 1983) ("A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn"); *City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093, 1099-1100 (2d Cir. 1977) (time expended in the administration of a consent judgment commands a lower

hourly rate); *Lindy Bros. Bldrs., Inc. of Phila.* v. *American R & S San. Corp.*, 487 F. 2d 161, 167 (3d Cir. 1973) ("reasonable rate of compensation differs for different activities").

The district court decided the issue in accordance with this Court's holding in *Hensley* and certiorari should be denied.

C. The legislative history of § 1988 does not support an award of fees equal to those obtained by antitrust lawyers in the marketplace.

Petitioners argue that the "underlying issue" is whether fee awards in civil rights or § 1988 cases will be at rates attorneys "command in similar types of litigation." (Petition, p. 20). As demonstrated above, pp. 9-10, petitioners misstate the issue presented. In any event, "moderation" is the cornerstone of all court awards of "reasonable" attorney's fees, including those in antitrust and other fee-shifting settings. *City of Detroit* v. *Grinnell, Corp.*, 495 F. 2d 448, 470 (2d Cir. 1974); *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670, 678 (3d Cir. 1983) (in cases awarding attorney's fees under ERISA, lawyers must exercise "restraint," the courts must insist on "moderation," and "excesses will not be countenanced").

Whether a given fee is excessive will also depend on the legislative history and policy considerations underlying the relevant fee-shifting statute. Although § 1988, ERISA, Title VII of the Civil Rights Act of 1964 and the Clayton Act all provide that fee awards must be "reasonable," the amount of the award may vary based on both the statute and the identity of the prevailing party. Thus, fees

awarded under § 1988 must be "moderate" because of Eleventh Amendment concerns. *Finney* v. *Hutto*, 437 U.S. 678, 692, n.18 (1978). The standards controlling fee awards under ERISA are different from those controlling under other statutes. *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670 673 (3d Cir. 1983) (under ERISA, the court must consider defendant's culpability and ability to pay, the deterrent effect of the award, the benefit conferred on the class, and the relative merits of the parties' positions). Fees awarded against a losing plaintiff in an employment discrimination case may be based on his ability to pay. *Faraci* v. *Hickey-Freeman Co., Inc.*, 607 F. 2d 1025, 1028 (2d Cir. 1979). A fee award in an antitrust case serves as a "penalty" for an intentional wrong. *Illinois* v. *Sangamo Construction Co.*, 657 F. 2d 855, 859-60 (7th Cir. 1981). Although fees for time expended seeking fees are clearly recoverable in all § 1988 cases, such fees are not awarded in antitrust cases resolved through a consent judgment. *Compare, City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093, 1100, 1102 (2d Cir. 1977), *with Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 637 (6th Cir. 1979); *cf. Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

An important policy consideration in § 1988 cases is that "waivers of [sovereign] immunity are strictly construed in favor of the sovereign." *Ruckelshaus* v. *Sierra Club*, —— U.S. ——, 103 S. Ct. 3274, 3277 (1983). In *Ruckelshaus*, the Court held that a statute providing for fee awards against the United States and private parties in "appropriate" cases could not be read to authorize a fee award to a losing plaintiff; more explicit language was required to abrogate the government's immunity. Plaintiffs must advance com-

pelling evidence that Congress intended to adopt the standard they urge. Ideally, the expression of Congressional intent must appear in "explicit statutory language." *Finney* v. *Hutto*, 437 U.S. 678, 706 (1978) (Powell, J. dissenting). All ambiguities must be resolved in favor of the State.

In the face of this demanding standard, petitioners are unable to rely on the plain language of the statute. Rather they are compelled to go over the legislative history with a fine-toothed comb searching for clues that support their position. They argue that antitrust rates should apply in § 1988 cases based on one-half of a sentence appearing in the relevant paragraph of the Senate Committee Report. (Petition, pp. 20-21, n.7). This meager authority is predictably inconclusive: petitioners distort the import of the Committee Report by ignoring the second half of the sentence, the very next sentence and the relevant paragraph as a whole. They cite only that part of the following paragraph in the Senate Committee Report quoted in italics below:

> *It is intended that the amount of the fees awarded under [1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases* and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, . . . are correctly applied in such cases as . . . [three cases listed]. These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. (Emphasis added.)

The first half of the cited sentence when read in conjunction with the second half of the sentence merely bars a distinction between antitrust and civil rights cases based upon the difference between pecuniary and nonpecuniary interests. But that does not mean that the standards controlling generally should be the same. Moreover, in the very next sentence, the "appropriate standards" for § 1988 cases are said to be those of *Johnson*, a civil rights case that explicitly approved fee awards as low as those authorized by the Criminal Act and minimum fee schedules. 488 F. 2d at 718. Thus petitioners' oft-cited sentence fragment is insufficient to establish a clear Congressional intent to approve fee awards against a state treasury equal to marketplace antitrust rates.[6]

6. Petitioners' sentence fragment, when read in isolation, requires this Court to hold that *all* § 1988 cases are "complex," an absurd result given that many simple cases are subject to § 1988 fee awards.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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